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In the Supreme Court of the United States

OCTOBER TERM, 1958

ANTHONY M. GRESKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. Ex. B) is not yet reported. The memorandum of the district court denying the motion for a new trial is not reported (Pet. Ex. A).

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1958 (Pet. Ex. B). The petition for a writ of certiorari was filed on December 18, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the trial court erred in refusing to grant petitioner's motion for a new trial based upon a letter from one juror that another juror was abusive to her before she joined in the verdict.

STATEMENT

On April 30, 1958, in the United States District Court for the Southern District of New York, petitioner was convicted on all counts of a nine-count indictment charging him with embezzlement of the mails and conspiracy (R. 2). The foreman reported the verdict on each count, and the clerk then asked the jury "You find the defendant Grieco guilty on counts one through nine, and so say you all?" The record then reads "The jury answers in the affirmative" (R. 15–16).

On May 5, the court received a letter from Mrs. Jean Curl, one of the jurors who participated in petitioner's trial. The letter stated (R. 19, 20; Pet. 5):

> My name is Mrs. Jean Curl, juror number eleven, in the Case of the United States vs. Mr. Grieco. This case was held in your court Monday April 28 to Wednesday April 30.
>
> I urgently need your advice because I haven't had any rest or peace of mind since last Wednesday.
>
> While in the jury room one juror was very abusive to me because I was the only one to find Mr. Grieco not guilty and holding everyone up. He got me so nervous that my heart was pounding. I was shaking and crying and so

confused that I finally said guilty. I want to retract that because I don't feel that I was in any condition at that point to render such an important decision affecting this man's future. Kindly advise me what to do.

On May 8, 1958, the court summoned counsel for the government and the petitioner and introduced this letter into the record as Court's Exhibit #4. May 15 was set for the receipt of any motions based upon the letter (R. 19; Pet. 5).

On May 15, petitioner made a motion to set aside the verdict and grant a new trial or, as an alternative, to reconvene the jury and take testimony regarding the allegations in the letter (R. 20–26; Pet. 6). The court ordered that no contact be made with Mrs. Curl, and, on May 22, petitioner's motion was denied (R. 3). On May 28, the trial judge in chambers, in the presence of both counsel, suggested that counsel for petitioner move for reargument, indicating that he would agree to summon Mrs. Curl for a limited inquiry into the alleged irregularities, the inquiry to be conducted by the court alone. On June 2, 1958, over objections of petitioner's counsel to the method of questioning and the failure to call the whole jury, the court took the testimony of Mrs. Curl (R. 26–36).

Mrs. Curl stated that she was a housewife with three years of high-school education and had been in the theatre. She had no physical or mental disabilities (R. 30–31). She said that the juror of whom she complained did not threaten her or do anything, that he upset her only by what he said and the way he spoke (R. 27–28). He spoke to her in a mean, shout-

ing tone of voice, and every time she said anything he yelled and told her that she had no common sense and that what she had to say had nothing to do with the case (R. 27–28). "In general he was yelling all the time," she stated (R. 28). About the fifth time he interrupted, another woman juror said "Let her talk," and Mrs. Curl finished what she wanted to say. She stated that she voted for the verdict that was rendered (R. 30).

After the examination, petitioner's counsel submitted thirteen questions for the court to propound to the juror (R. 37–38). The court asked questions relating to communications with the juror after the verdict (R. 32–36). It declined to ask questions relating to Mrs. Curl's belief in petitioner's guilt, or to have the juror of whom complaint was made identified. The court then denied the motion for reargument (R. 36). On May 27, petitioner was sentenced to 18 months on each of the nine counts, to run concurrently (R. 3). The Court also sentenced him to a consecutive term of 18 months on a second indictment to which he had pleaded guilty.

On appeal, the Court of Appeals affirmed the order of the district court (Pet. Ex. B) and upheld petitioner's conviction.

ARGUMENT

Petitioner contends that the instant case presents an exception to the rule that the testimony of jurors will not be received to impeach their verdict. He further argues that, once the testimony of Mrs. Curl was received, the court should have summoned the

other eleven jurors and taken their testimony as to what occurred during their deliberations (Pet. 9-12).

This Court said in *Mattox* v. *United States,* 146 U. S. 140, 149:

> "* * * the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. So a juryman may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial." * * *

See also *Clark* v. *United States,* 289 U. S. 1; *McDonald* v. *Pless,* 238 U. S. 264.

Mrs. Curl's testimony related solely to the "influences which affected" her deliberations. She stated that the offending juror got her "mixed up" by yelling at her and repeatedly told her that what she had to say had nothing to do with the case. She did state, however, that eventually he kept quiet and permitted her to say what she wanted to. She voted for the verdict and did not express disagreement when the clerk asked the jury if the verdict was theirs. All that is involved is the mental processes by which the juror reached her verdict. That, under long-established decisions of this Court, is not a basis for impeachment.

To make certain that this was not such an extraordinary case as might justify departure from the

long-established rule discussed above, the trial court did question Mrs. Curl. If it erred in so doing, it erred in giving petitioner more than was his due. But since, from the testimony of Mrs. Curl herself, it became evident that this was not a case in which a juror should be permitted to impeach her own verdict, the court properly refused to summon the other jurors. As the Court of Appeals ruled (Pet. 22):

> We do not say that there can be no threats short of violence by one juror against a recalcitrant dissenter that will upset a verdict, but certainly there was nothing in the case at bar to justify such action.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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